REMARKS

After the foregoing Amendment, claims 1, 3, and 5-28 are pending in this application. Claims 6, 8, 11-13 and 15-25 were withdrawn from consideration. Claims 2 and 4 are cancelled without prejudice. This reply amends claim 1 to more distinctly claim the subject matter that Applicant regards as the invention, and claims 1, 5, 7, 9, 10, and 14 to correct minor informalities. These amendments introduce no new matter into the application.

Claim Rejections - 35 USC §103

The April 23, 2008 Office Action ("Action") rejects claims 1, 3, 5, 7, 9, 10, 14, and 26-28 as obvious under 35 U.S.C. §103(a) over Krotzer (WO 99/61038) in view of Thomas (U.S. patent 5,972,985). Applicant respectfully traverses this rejection.

Claim 1, as amended, recites a "drink composition for balancing function of muscles and mind, acting as a relaxant, and counterbalancing the effects of adrenaline." Neither of the cited references teach these limitations.

In the Reply dated November 27, 2008 ("Reply"), Applicant stated that both Krotzer and Thomas were non-analogous art with respect to the claimed invention, and that one of ordinary skill in the art would not look to these references to solve the technical problem addressed by the current invention. With respect to Krotzer, the Reply pointed out that Krotzer teaches a composition to "protect the brain,"

whereas Applicant's invention is directed a composition aimed to "balance the function of the muscles and mind, thus acting as relaxants and agents that counterbalance the effects of adrenaline." See Krotzer at p. 4. The Action responded by stating that this argument was unpersuasive because, "these features are not recited in the claim." In response, Applicant has amended independent claim 1 to include these limitations, reciting "[a] drink composition for balancing muscle and mind function, acting as a relaxant, and counterbalancing the effects of adrenaline."

The Action further stated that "even if these features *were* recited in the claims, the claimed invention would still be considered properly rejected based on the prior art...because a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art." With respect to this argument, Krotzer's disclosed composition is structurally distinct from Applicant's because, as admitted in the prior Office Action, dated August 29, 2007 ("Prior Action"), Krotzer "does not specifically teach using pine park pycnogenols or grape seed extract."

Regarding the use of Thomas in rejecting the claims, the Reply pointed out that this reference is also non-analogous art, also teaching the use of pycnogenols and grape seed extract to "protect the brain." This objective was even recognized by the Examiner in the Prior Action. See Prior Action at p. 5. However, the Action held Thomas to be within the range of analogous art, stating "Thomas is directed to

nutritional supplements that contain ingredients that overlap with applicant's claimed ingredients. Therefore, Thomas is considered analogous art because it is in the same field of endeavor as applicant's as evidenced by this overlap in subject matter."

In *Ex Parte Kurt*, a case decided after *KSR v. Teleflex*, the Board of Patent Appeals and Interferences recognized the continued existence of the requirement that a reference under 35 U.S.C. § 103 be within the range of analogous art to that that of the claimed invention. Appeal 2007-4172 (B.P.A.I. Nov. 30, 2007). In this case, the Board overturned an Examiner's rejection under § 103 of claims directed to a "lithographic apparatus" holding the reference to be non-analogous art. The claims recited an "optical layer comprised of an alloy of Mo and Cr," with the Mo-Cr layer used for its reflective properties. The reference taught that a Mo-Cr alloy provided a "superior mirror finish." Although both the claims and the reference taught the use of a Mo-Cr alloy for its reflective properties, the reference did not render the claims obvious because it was "not reasonably pertinent to any problem regarding optical elements in the lithographic arts." It is therefore the technical problems addressed by the claims and references, and not merely the fact that they contain some of the same elements, which may render them within the range of analogous art.

Because Applicants invention *as claimed* is directed to a drink composition "for balancing of muscle and mind function, acting as a relaxant, and counterbalancing the effects of adrenaline," and Thomas does not address this problem, it cannot be considered within the same field of endeavor. Thomas cannot be considered analogous art, and therefore cannot be properly used in a rejection of the claims under 35 U.S.C. §103.

Both of the cited references are non-analogous art with respect to the presently claimed invention, and a person of ordinary skill in the art would have not looked to either of them, muchless combined their teachings, to solve the problem addressed by Applicant's claimed invention.

The remaining claims depend from claim 1 and should be patentable for at least the reasons discussed above.

Based on the foregoing, Applicant respectfully submits that the rejection of claims 1, 3, 5, 7, 9, 10, 14, and 26-28 as obvious under 35 U.S.C. §103(a) is overcome and requests withdrawal of the same.

Conclusion

If the Examiner believes that any matters need to be addressed in order to place this application in condition for allowance, or that a telephone interview will help to advance the prosecution of this application, the Examiner is invited to contact the undersigned by telephone at the Examiner's convenience.

In view of the foregoing, Applicant respectfully submits that the present application, including claims 1, 3, 5, 7, 9, 10, 14, and 26-28, is in condition for allowance and a notice to that effect is respectfully requested.

Respectfully submitted,

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